No. 77-661

In the Supreme Court of the United States

OCTOBER TERM, 1977

GEORGE MOSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, Jr.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
JEROME M. FEIT,
JOSEPH S. DAVIES, Jr.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

233-475

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-661

GEORGE MOSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 562 F. 2d 155.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on September 6, 1977. The government's petition for rehearing was denied on October 13, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on November 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

At his trial for bankruptcy fraud, petitioner testified in his own defense and on cross-examination admitted without objection that he had given perjurious immunized testimony at the earlier bankruptcy proceeding from which the criminal charges stemmed.

The question presented is whether in these circumstances admission of the concededly perjurious statements to impeach petitioner's credibility at trial constituted reversible error.

STATUTE INVOLVED

11 U.S.C. 25(a)(10) provides in pertinent part:

> The bankrupt shall * * * submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge * * *.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of eleven counts of bankruptcy fraud, in violation of 18 U.S.C. 152, and one count

of conspiracy to commit that crime, in violation of 18 U.S.C. 371.[1] He was sentenced to concurrent terms of two years' imprisonment and fined $1,000 on each count. Eighteen months of the prison sentence were suspended. The court of appeals affirmed in part and reversed in part.[2]

---

[1] Counts I and III charged petitioner with concealing a G.M.C. truck and a 1969 Chevelle station wagon in contemplation of the bankruptcy proceeding, while Counts II and IV charged him with concealment of the truck and station wagon from the trustee and creditors of the bankrupt. Counts XI and XII charged petitioner with fraudulently withholding from the trustee registration papers showing the bankrupt's ownership of these vehicles. Counts VI and VII respectively charged petitioner with concealing from the trustee a Clark fork-lift and three Bench-Master presses. Counts VIII, IX, and X charged petitioner with cashing and concealing from the trustee checks for $1,000, $1,122.43, and $1,500, payable to the bankrupt. Count XIV charged petitioner with conspiring with co-defendant Arnold Rubin and others to commit offenses in violation of 18 U.S.C. 152.

[2] The government conceded and the court of appeals agreed (Pet. App. 4a) that Counts I and XI merged with Count II, and that Counts III and XII merged with Count IV. The government also conceded that, completely apart from its merger into Count IV, Count III failed for insufficiency of evidence. Accordingly, the court reversed the conviction on Count III; the court affirmed the convictions on all other counts, because the identical concurrent terms of imprisonment imposed involved no duplication of sentencing. With respect to the fines that petitioner was sentenced to pay, the court held that the fines on the merged counts should not be cumulative, and so remanded for resentencing. (In announcing its result (Pet. App. 18a), the court of appeals revealed some confusion about which counts had merged into which. In particular, the court declared that "Count One merged into Count Three which failed for insufficiency, and Count Two merged into Count Four." As a consequence of this error, the court incorrectly concluded that no fine could properly be imposed on the basis of Count II.)

The sufficiency of the evidence adduced at trial is not now challenged. That evidence showed that petitioner had engaged in a carefully planned bankruptcy fraud involving Stafford Manufacturing Co. ("Stafford"), a bankrupt corporation of which petitioner was the president. After Stafford was adjudicated bankrupt and a trustee was appointed to take possession of the corporation's assets and reduce them to cash, petitioner concealed certain assets of the bankrupt from the trustee and transferred some of the bankrupt's property to a successor corporation which he had founded, American Identification Products, Inc. At trial, petitioner admitted that he had testified falsely about these transactions before the bankruptcy court.

ARGUMENT

Petitioner contends that his concededly perjurious testimony in the bankruptcy proceeding was inadmissible to impeach his credibility at his subsequent criminal trial for bankruptcy fraud. This claim fails for both procedural and substantive reasons. Petitioner did not object at trial to the prosecutor's cross-examination concerning his earlier testimony, and he thereby waived any right to raise such a challenge on appeal. Moreover, as the court of appeals correctly held, petitioner's own admission that his earlier testimony was false deprived him of any meritorious claim that his statutory immunity or Fifth Amendment privilege had been violated.

1. At trial petitioner took the stand and stated that he had "appeared" at the bankruptcy proceeding in

August 1972 (Pet. App. 9a). The prosecutor immediately requested a sidebar conference, during which he warned that if defense counsel asked further questions regarding the bankruptcy proceeding, the government would take the position that any Fifth Amendment privilege covering testimony given at that proceeding had been waived. Defense counsel and the court responded that petitioner, by testifying in his own defense, had already waived any privilege he might otherwise have enjoyed under the Fifth Amendment or Title 11 of the United States Code. Thereafter, on cross-examination, defense counsel failed to object when the prosecutor asked petitioner questions about his testimony at the bankruptcy proceeding. Petitioner admitted that some of the answers he had given at that proceeding were false.[3] Several days after the cross-examination had been completed, defense counsel moved for a mistrial on the ground that the government had improperly used petitioner's earlier perjured testimony. The district court held that the failure to object constituted a waiver of any privilege or immunity.

The district court's ruling was correct. Inasmuch as the defense failed to raise a timely objection at the time the evidence was admitted, the court of appeals should not have reached the immunity issues raised by petitioner. See, *e.g.*, *On Lee* v. *United States*, 343 U.S. 747, 749 n. 3.

[3] The cross-examination was directed to countering petitioner's testimony at trial that he had never concealed property with the requisite criminal intent.

The court of appeals rejected the waiver theory on the erroneous premise that, because a constitutional right was involved, waiver required "an intentional relinquishment of a known right by the client rather than by the lawyer" (Pet. App. 13a–14a.)[4] There is, however, no requirement that a defendant must personally waive an objection to the admission of evidence at trial. Indeed, only recently this Court rejected the broad language of *Fay* v. *Noia*, 372 U.S. 391, insofar as it might be read to support such an extraordinary approach in the face of a contemporaneous objection rule. *Wainwright* v. *Sykes*, No. 75–1578, decided June 23, 1977, slip op. 12, 14–18.

Moreover, contrary to the opinion of the court of appeals (Pet. App. 14a), the contemporaneous objection rule *is* mandated "by rule or statute." See Rule 103(a)(1), Fed. R. Evid. Similarly, Rule 51, Fed. R. Crim. P., contains a provision which has been construed to require a contemporaneous objection in order to preserve an issue for appeal.[5] Wright, *Federal Practice and Procedure, Criminal*, § 842 (1969). And finally, even in the absence of a "rule or statute" requiring a contemporaneous objection, there would be

[4] Even if the court of appeals' concept of "waiver" were applied, it could be argued that petitioner himself, by taking the stand, did "intentionally relinquish" whatever preexisting right he may have had to bar admission of the perjurious statement. See *Raffel* v. *United States*, 271 U.S. 494.

[5] These provisions, of course, have the same force and effect as Rule 12, Fed. R. Crim. P., which this Court held, in *Davis* v. *United States*, 411 U.S. 233, takes precedence over a knowing and deliberate waiver standard, such as the one applied by the court of appeals in this case.

little basis for the approach adopted by the panel. As Judge Friendly has argued,

> the defendant's constitutional right is to have a full and fair opportunity to raise his claims on trial and appeal and the assistance of counsel in doing so. There is no need to find a 'waiver' when the defendant or his counsel has simply failed to raise a point in court, since the state has not deprived him of anything to which he is constitutionally entitled.

Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 159 (1970).

2. Assuming *arguendo* that petitioner's claim had been properly preserved, the court of appeals correctly decided that the prosecutor's use of petitioner's previous perjurious statements violated neither the immunity provisions of the Bankruptcy Act, 30 Stat. 548, as amended, 11 U.S.C. 25(a)(10), nor the self-incrimination clause of the Fifth Amendment.

a. Petitioner concedes (Pet. 6), as he must, that the Bankruptcy Act permits prosecution for perjury committed under a grant of immunity. *Glickstein* v. *United States*, 222 U.S. 139 (construing an earlier version of Section 25(a)(10)). Thus, although the Bankruptcy Act contains no specific provision for perjury prosecutions,[6] this Court stated in *Glickstein* (*id.* at 143) that perjury is entitled to no protection

[6] The general immunity statute, 18 U.S.C. 6002, makes the perjury exception explicit. See *Kastigar* v. *United States*, 406 U.S. 441. Petitioner can derive no comfort from this Court's statement in *Kastigar*, *supra*, 406 U.S. at 453, that Section 6002 prohibits use of compelled testimony "in *any* respect," since this remark was directed only to the use of incriminatory *truthful* testimony.

> since the statute expressly commands the giving of testimony, and its manifest purpose is to secure truthful testimony, while the limited and exclusive meaning * * * attribute[d by the bankrupt] to the immunity clause would cause the section to be a mere license to commit perjury, and hence not to command the giving of testimony in the true sense of the word.

See also *United States* v. *Dornau,* 491 F. 2d 473, 480 (C.A. 2).

Petitioner seeks to escape application of this principle by arguing that it applies only where perjury itself is the subject of prosecution (Pet. 6–7).[7] But, as the court of appeals aptly observed, this case was "a prosecution under the Bankruptcy Act in which the subjects of the direct testimony on trial are likely to be akin to those testified to in the bankruptcy hearing, much as in perjury prosecutions" (Pet. App. 17a). Noting that petitioner had conceded his statements were perjurious, the court concluded (Pet. App. 16a):

> The use immunity had been dissipated so far as the testimony was wilfully false. And the acknowledgement by the defendant that it was perjurious rendered it usable.

[7] Petitioner argues (Pet. 7) that he is entitled to a new trial because the government committed "a threshold impropriety" when it proceeded to cross-examine him on the basis of his bankruptcy testimony without his having admitted or the court having determined that that testimony was false. Since petitioner eventually admitted that his testimony was false, he suffered no prejudice. Moreover, petitioner can hardly complain that there was no threshold determination of falsity when he failed to interpose an objection that would have raised the issue.

At least to the extent that petitioner testified falsely and thereby failed to honor his part of the immunity bargain, the government was not precluded from using his testimony at the later criminal trial. See also *United States* v. *Bryan,* 339 U.S. 323, 338–341; *United States* v. *Tramunti,* 500 F. 2d 1334, 1342–1344 (C.A. 2), certiorari denied, 419 U.S. 1079. Indeed, it was *only* to the extent that petitioner had testified *falsely* in the bankruptcy court that his testimony there was useful to the government at the criminal trial. The fact that petitioner had lied in the bankruptcy court about the disposition of Stafford's property tended to show that his concealment of that property from the trustee was knowing and fraudulent and therefore violative of 18 U.S.C. 152. Thus, this case does not involve the situation in which truthful immunized testimony may have been used to incriminate the declarant.

b. This reading of the immunity provision of the Bankruptcy Act creates no conflict with the self-incrimination clause of the Fifth Amendment. In *United States* v. *Kahan,* 415 U.S. 239, the accused, in order to obtain appointed counsel, gave false statements at arraignment. The statements were later admitted at trial during the government's case in chief. This Court rejected the claim that the Fifth Amendment barred introduction of the false pretrial statements. Unlike *Simmons* v. *United States,* 390 U.S. 377, *Kahan* did not involve "the use of pretrial testimony at trial to prove its incriminating content." 415 U.S. at 243. Rather, in *Kahan,* "the incriminating component of

respondent's pretrial statements derive[d] not from their content, but from [their falsity and] respondent's knowledge of their falsity" (*ibid.*).[8] This rule is equally applicable here, where petitioner acknowledged the falsity of his pretrial testimony and the fact of that earlier perjury, not its content, was used to impeach petitioner's testimony at trial.[9]

[8] See also *United States* v. *Kahan*, *supra*, 415 U.S. at 248 (Marshall, J., dissenting): "If the defendant's willfully false statement can be used against him at a subsequent perjury trial, I see no reason why it cannot be used against him at his pending criminal trial. * * *"

Mr. Justice Marshall dissented only because the district court admitted respondent's arraignment statements without first finding formally that those statements had been willfully false (*id.* at 249).

[9] Petitioner's citation (Pet. 8–9) of dictum in *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 350 n. 10, does not dictate a contrary result. In *Shotwell*, the Court sought to distinguish between petitioners' voluntary incriminating disclosures and similar disclosures made after a grant of immunity. In the latter case, the Court said, "the truth or falsity of * * * a disclosure would * * * be irrelevant to the question of its admissibility." Read in context, the Court's remark plainly referred to incriminating disclosures, such as confessions, and to the attempted use of such disclosures as direct evidence of guilt in a subsequent criminal trial. Here, by contrast, petitioner's testimony at the bankruptcy proceeding was not itself incriminating and was used only for impeachment purposes at the later criminal trial. Under these circumstances, the conceded falsity of the earlier testimony was hardly irrelevant.

Likewise, *United States* v. *Frumento* 552 F. 2d 534, 543 (C.A. 3), upon which petitioner relies, does not support reversal of the court of appeals in this case. In *Frumento*, the Third Circuit reiterated its previous holding that truthful immunized testimony may not subsequently be used for impeachment. See *United States* v. *Hockenberry*, 474 F. 2d 247, 249–250 (C.A. 3). The court expressly endorsed, however, the principle enunciated by the Second Circuit in *United States* v. *Tramunti*, *supra*, namely that "*untruthful* testimony is unprotected," even if given under a grant of immunity. See 552 F. 2d at 543 n. 16. The use of such admittedly untruthful testimony to impeach an immunized witness is precisely the situation presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BENJAMIN R. CIVILETTI,
Assistant Attorney General.
JEROME M. FEIT,
JOSEPH S. DAVIES, JR.,
Attorneys.

FEBRUARY 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978